No. 88-5986

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IN THE

Supreme Court of the United States

October Term, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

On Appeal From The Supreme Court Of Ohio

BRIEF OF COVENANT HOUSE AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *AMICI CURIAE*

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QUESTION PRESENTED

It is unconstitutional for a state to protect the privacy, autonomy, and dignity of children exploited in graphic pornography by outlawing the private possession and viewing of such materials unless they have substantial scientific, artistic or educational value?

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BRIEF *AMICI CURIAE*

Covenant House and the National Center for Missing and Exploited Children respectfully submit this brief *amici curiae* in support of the State of Ohio in this case. The written consents of the parties have been obtained and submitted to the Clerk.

STATEMENT OF INTEREST

Covenant House is a not-for-profit, tax-exempt organization, incorporated in New York, that takes as its mission the shelter and care of homeless and runaway children. Currently its programs are located in New York, Houston, Toronto, Fort Lauderdale, New Orleans, Anchorage, Los Angeles, and Central America, and serve over 20,000 destitute children and teenagers each year. Those youths have generally been exposed to the worst of street life, with an estimated 50 percent involved in formal or informal prostitution to survive, and a substantial number involved in child pornography as well. To urge young people to avoid the desperation of streetlife, Covenant House in 1987

launched a national toll-free hotline—the "NINELINE"—for children and families at risk. In the past two years 130,000 crisis calls have been received and responded to by the NINELINE.

Because of its focus on the needs of "street kids," Covenant House has been a leader in battling child pornography and other forms of sexual exploitation. As *amicus curiae* Covenant House filed briefs in *New York* v. *Ferber*, 438 U.S. 747 (1982); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988); and *Massachusetts* v. *Oakes*, 491 U.S. ___, 105 L.Ed.2d 493 (1989). As advocate during the past decade Covenant House played important roles in drafting and obtaining passage of the Child Protection Act of 1984, 18 U.S.C. §§2251-2254, 2256, and the Child Abuse Victims Rights Act of 1986, 18 U.S.C. §2255, which together form the core of the federal attack on the child pornography industry.

The National Center for Missing and Exploited Children (the "Center") is a nonprofit, tax-exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, and encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement three tasks under the Missing Children's Assistance Act (Public Law 98-473; 42 U.S.C. §§5771-5777): to operate the national toll-free hotline for reports of missing children; to operate the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and to assist OJJDP in performing its task of coordinating federally funded programs relating to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, to 39 state missing children clearinghouses, 130 nonprofit organizations, and interested child advocates, and training to professionals on investigation and prosecution of child pornography.

The Center has disseminated more than 1.7 million free copies of the eight books and 11 brochures it has developed, including four specifically devoted to child sexual victimization: *Child Pornography and Prostitution: Background and Legal Analysis* (produced in cooperation with Covenant House and the U.S. Department of Justice), *Children Traumatized in Sex Rings*, *Interviewing Child Victims of Sexual Molestation*, and *Child Molester: A Behavioral Analysis*. The Center's *Selected State Legislation* identifies model legislation related to children, including laws against sexual exploitation.

Because both Covenant House and the Center know through their work the unique agony experienced by children used in graphic pornography, they seek in this brief to bring the perspective of those children to bear on the legal questions at issue in this case.

SUMMARY OF THE ARGUMENT

It is the consensus view of scholars, clinicians, and of this Court that the use of children in explicit pornography is an outrage against which the states are entitled to take the strongest possible actions. *New York* v. *Ferber*, 458 U.S. 747 (1982). In the statute challenged here, Ohio has forbidden the possession of materials which graphically focus on the genitals of a child, unless such materials have a legitimate scientific, educational, artistic or other purpose. Ohio Rev. Code Ann. §2907.323(A)(3) (Anderson 1987).

Because possession and private viewing of child pornography perpetuate its existence, such activities deeply violate the ex-

ploited child's privacy and threaten his or her ability to build a life free of the threats of blackmail and public exposure of the materials. From an adult viewer's perspective, by contrast, such materials have no value as meaningful "speech" and are, in any case, *nonconsensual* "speech" by the children abused. They are thus not distinguishable under the First Amendment from the "speech" received by a peeping tom or an electronic eavesdropper, but are wholly different from the consensually produced adult obscenity at issue in *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Ohio's statute is a laudable, constitutional exercise of its responsibilities to protect the young from exploitation.

Appellant's more technical attacks on his conviction are equally unfounded. The Ohio statute gave him ample, eminently "fair" warning that his conduct would be found illegal under the statute as construed by the state courts, and he is thus in no position to resurrect the statute's asserted pre-construction overbreadth as grounds for overturning his conviction. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). Likewise, his attacks on the *Ferber* Court's approval in child pornography statutes of "lewd exhibition of the genitals" or the Ohio Supreme Court's more specific formulation of "graphic focus" on the genitals are both unfounded in precedent and insensitive to the privacy interests such statutes are designed to protect.

Ohio's statute, as authoritatively construed by its highest court, is constitutional on its face and as applied to Appellant, and the decision below should be affirmed.

INTRODUCTION

> But somehow the stuff that I did for (name of pornographer) and that I let them film and I know people saw, I just don't think I can touch any girl. I don't even mean sex. I mean I can't love anyone good. I'm like an animal. Why would she want to have anything to do with me?
>
> —Mike, former street kid[1]

Used in hard-core pornography while enmeshed in street life at age 16, Mike was still not clear of the nightmare eleven years later. As reported by the San Francisco program to which he came for help, he arrived "alone, and wanting to die."[2] Two years of intensive intervention were required at that point "to bring him to separate the acts from himself and the past from his future", and fully five years elapsed before his life contained a healthy relationship with a woman.[3]

In 1982 this Court found as "easily [passing] muster under the First Amendment" the legislative judgment that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *New York* v. *Ferber*, 458 U.S. 747, 758. Subsequent developments in law[4]

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[1] Quoted in M. Silbert, *The Effects on Juveniles of Being Used For Prostitution and Pornography* 23 (1986), appended to E. Mulvey & J. Haugaard, *Report of the Surgeon General's Workshop on Pornography and Public Health* (1986) (hereinafter "Surgeon General's Workshop").

[2] *Silbert, supra* note 1, at 22.

[3] *Id.* at 23.

[4] *See* Child Protection Act of 1984, Pub. L. No. 98-292, §3, 98 Stat. 204; Child Abuse Victim's Rights Act of 1986, Pub. L. No. 99-591, §§701-705, 100 Stat. 3341-74 (providing civil remedy for children used in pornography). These and other legal responses to the *Ferber* decisions are discussed in H. Davidson & G. Loken, *Child Pornography and Prostitution* 7-12 (Nat'l Center for Missing & Exploited Children 1987); Loken, *The Federal Battle Against Child Sexual Exploitation: Proposals for Reform*, 9 Harv. Women's L. J. 105, 112-115 (1986).

and literature[5] have strongly reinforced that judgment—developments which have clearly not escaped the notice of the Court. *See Massachusetts* v. *Oakes*, ___ U.S. ___, 105 L.Ed.2d 493, 507 (1989) (Brennan, J., dissenting); and *id.* at 504-505 (Scalia, J., concurring and dissenting). Child pornography thus remains "without the protection of the First Amendment", *Ferber*, 458 U.S. at 764, because the prevention of child sexual exploitation is "a government objective of surpassing importance." *Id.* at 757.

A unanimous Court in *Ferber* held that the *circulation* of graphic pornography involving children has no warrant in the First Amendment. Here the central question may be put a little differently: does the First Amendment sanction the existence of child pornography when it comes to rest? That is, does the Constitution protect the ultimate *goal* of those who produce child pornography —to allow a consumer of the material to possess it, preserve it, and enjoy it?

Because of the special, devastating nature of child pornography, in which the most vulnerable of citizens are subjected to sexual abuse followed by nonconsensual revelation of their most private behavior and personal characteristics, the answer cannot be affirmative. The continued existence of a pornographic photograph constitutes a grievous, ongoing injury and threat to the children depicted, while a flat ban on the material poses no threat to adult freedom or privacy. Appellant's exclusive reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is profoundly misguided, and his parsing of overbreadth doctrine from *Ferber* to *Oakes* wholly perverse.

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[5] For a review and discussion of the literature, see *Surgeon General's Workshop*, *supra* note 1, at 13-16, which found that it is the "consensus" of social scientists that "[c]hildren and adolescents who participate in the production of pornography experience adverse, enduring effects." *Id.* at 13.

I. POSSESSION AND PRIVATE VIEWING OF CHILD PORNOGRAPHY ARE UNPROTECTED BY THE CONSTITUTION.

In *Ferber* this Court resolved the constitutional status of child pornography by attending closely to the nature of the harms it causes to children, and then measuring the impact of state intervention on First Amendment freedoms. 458 U.S. at 756-764. Because of *Ferber's* unanimous, uncontroversial character,[6] this case presents no occasion for reconsidering its central insights. Indeed, the only theoretical issue that caused even mild dissension in *Ferber*—whether materials with "serious literary, scientific, or educational value" are exempt from its holding, *compare id.*, 458 U.S. at 766-776, and *id.* at 775-776 (O'Connor, J., concurring) *with id.* at 776-777 (Brennan, J., concurring in the judgment)—is entirely absent here.[7] The task in this case is, by contrast, a relatively narrow one—harmonizing *Stanley* and *Ferber*—but one certain to affect profoundly the capacity of the states to protect sexually exploited children.[8]

A. Possession And Private Consumption Of Child Pornography Constitute Grave Ongoing Harms To Abused Children.

It is the remarkable position of Appellant in this case that: "The state's interest in regulating the private possession of child

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[6] Among commentators *Ferber* has met with virtually unanimous approval. *See, e.g.*, L. Tribe, *American Constitutional Law* 914-915 (1988); Schauer, *Codifying the First Amendment: New York* v. *Ferber*, 1982 S. Ct. Rev. 285 (1983).

[7] The statute challenged in this appeal contains, of course, a full exemption for material that has "a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose", Ohio Rev. Code Ann §2907.323 (A)(3)(a) (Anderson 1987), thus protecting an even greater range of speech than the "value" exception debated in *Ferber*.

[8] For an overview of the practical benefits of possession statutes to law enforcement, see Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15, 54-71 (1987-88). The difficulties of investigation and prosecution *without* such statutes are outlined in S. Goldstein, *The Sexual Exploitation of Children* 147-174 (1987) (describing the absence of such statutes in most states as "unfortunate", *id.* at 147).

pornography is no greater than its interest in prohibiting the private possession of obscene materials." Appellant's Brief at 31. Wholly unsupported by authority or evidence, that view betrays a bewildering insensitivity to what is at stake for a child coerced or seduced into sexually explicit photography. The continued existence and private viewing of such pornography threatens, in an acutely damaging way, the privacy, autonomy, and dignity of the children victimized.[9]

To say that possessing and viewing child pornography violates a child's "privacy" borders on ludicrous understatement. In such materials a child's genitals are typically put on graphic, sharply focused display, or, even worse, the child is shown in the midst of actual sexual intercourse. It is impossible to conceive any starker violation of "the individual interest in avoiding disclosure of personal matters", *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977), and it was explicitly on privacy grounds that the Court substantially rested its decision in *Ferber*. *See especially* 458 U.S. at 759n.10 (citing *Whalen* and distinguishing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)). Sexuality is at the very core of any conception of the "privacy" interest,[10] and that interest is no less

[9] *Amici* recognize the appeal of arguments that the possession of child pornography threatens children *other* than the ones already abused because of its usefulness by pedophiles as a tool of seduction. Goldstein, *supra* note 8, at 129, but do not rely on that argument here. Nor do *Amici* base their defense of Ohio's statute on empirical assessments of what effects the law will have on the overall *market* for child pornography, although such effects can only be negative. These arguments require a degree of factual speculation not necessary in a case that can be decided based on real injuries to identifiable children's privacy and autonomy interests. *Cf.*, *Ferber*, 458 at 778-779 (Stevens, J., concurring in the judgment).

[10] *See, e.g., The Florida Star v. B.J.F.*, ___ U.S. ___, 105 L.Ed.2d 443, 458 ("privacy" of rape victims is "highly significant" interest), and *id.* at 466 (White, Jr., dissenting); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607-609 (protecting minor's privacy in rape case a "compelling" interest that would justify denying the press access to "sensitive details" about the victim); *York* v. *Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) (fraudulently obtained nude photograph which was then circulated held basis for federal civil rights action).

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violated when a child's body is viewed in hundreds of bedrooms than it is by showings in public theatres. It is no solace to the victim of a peeping tom that the perpetrator is watching with binoculars from the comfort of his own living room.

In addition to describing "disclosure of personal matters" as part of the individual interest in privacy, *Whalen* v. *Roe* also placed within its boundaries the "interest in independence in making certain kinds of important decisions", 429 U.S. at 599-600—or what may be termed, more simply, personal autonomy. And it is limpidly evident how the continued existence of child pornography compromises that interest for the children exploited. Most obviously, of course, the possessor of child pornography has the power of literal blackmail over children depicted—a power that is frequently used.[11] More importantly, however, the preservation of such material perpetuates the risk to the child that it will surface in some highly public and embarrassing manner in the future.[12] Experts on sexual abuse emphasize that feelings of "stigmatization" and "powerlessness" are at the heart of the long-term damage such abuse inflicts,[13] and, conversely, that "helping victims regain control over their lives is

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See also, Restatement (Second) of Torts, §652D, Comment h (1977) ("There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself."); Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Calif. L. Rev. 772, 851 (1985) (identifying "bodily functions and sexual activities" as at the core of privacy interests needing protection); Bryant, *Sexual Display of Women's Bodies—A Violation of Privacy*, 10 Golden Gate Univ. L. Rev. 1211 (1980).

[11] Belanger, *et. al.*, *Typology of Sex Rings Exploiting Children* in *Child Pornography and Sex Rings* 51, 52-54 (A. Burgess ed. 1984); Goldstein, *supra* note 8, at 92.

[12] *See Shields* v. *Gross*, 58 N.Y.2d 338 (1983) (nude photographs of child published many years later). As *Whalen* recognized, the mere storage of confidential information "creates a genuine concern that the information will become publicly known and . . . adversely affect [patients'] reputations." 429 U.S. at 600.

[13] Finkelhor, *The Trauma of Sexual Abuse* in *Lasting Effects of Sexual Abuse* 61, 70-72, 75-77 (G. Wyatt ed. 1988); Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 292 (1980).

critical to the recovery process".[14] Possession—*i.e.*, preservation—of child pornography by another denies children such control, and can only contribute to the devastating "learned helplessness" that dominates the lives of sexually exploited children long after the initial abuse.[15]

Permitting adults to enjoy the products of sexual abuse of children is, in essence, an affront to the dignity of all children. In the words of one astute scholar, "Child pornography subjects individual children to actual violence and also uses their images to damage and devalue all children."[16] How much more, then, does it damage and devalue the children whom it actually depicts? And how much value could such children be said to have in a society where the existence of the materials created out of their pain had *constitutional* protection? It is, ultimately, impossible to provide adults a First Amendment "right" of private consumption and possession of child pornography while still maintaining an equal measure of dignity under that Amendment for the children exploited. Any "dialogue" that includes showing their pictures is "speech" which "by [its] very utterance inflict[s] injury". *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). *See* L. Tribe, *American Constitutional Law* 890, 914-915 (1988).

B. No Significant Privacy Or First Amendment Interests Depend On Protecting Private Possession Of Child Pornography.

What, though, of countervailing injuries, of losses to aduit freedom that flow from statutes like that of Ohio? Appellant has, in fact, rather little to say on this point, but does offer two areas

[14] Wyatt & Mickey, *The Support by Parents and Others as It Mediates the Effects of Child Sexual Abuse*, in *Lasting Effects of Sexual Abuse*, *supra* note 13, 211, 224.

[15] Silbert, *supra* note 1, at 29 (child pornography victims, even after many years, "have lost any sense of control over their lives and have accepted feeling trapped and victimized").

[16] Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860, 1901 (1987).

for concern: (1) the "right to receive information"; and (2) the "privacy of the home". Appellant's Brief at 30. Listened to carefully, however, these echoes of *Stanley* are thin and hollow.

It is difficult, to begin with, to take seriously the claim that child pornography provides "information" or "ideas" in any sense that would have been meaningful to the Court in *Stanley*. 394 U.S. at 564. In *Ferber* the Court explicitly found that the First Amendment value of such depictions is "exceedingly modest, if not de minimis." 458 U.S. at 762; *id.* at 781 (Stevens, J., concurring in the judgment). And here, unlike the New York statute at issue in *Ferber*, Ohio has excluded from its prohibitions all material with any artistic, scientific, educational or other substantial value. Ohio Rev. Code Ann §2907.323 (A) (3) (a) (Anderson 1987). To what facts or concepts, then, will Appellant be denied access if the statute is enforced? On this subject his brief is silent. As the *Ferber* Court pointed out, Appellant would never even be in the position to possess and consume child pornography if laws against its production were fully effective. 458 U.S. at 762.

More fundamentally, however, child pornography is radically different from the adult obscenity at issue in *Stanley* because even if it can be described as meaningful communication, it is not *consensual* communication. While as a general matter it may be fair to say that children are often "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring), *no* child has even the slightest capacity to give meaningful consent to appearing in child pornography.[17] *See Massachusetts* v. *Oakes*, ___ U.S. ___, 105

[17] *See, e.g.*, Abel, *et al.*, *Complications, Consent and Cognitions in Sex Between Children and Adults*, 7 J. Law & Psych. 89, 96 (1984) ("when an adult requests that a child remove his or her clothes, that request is made from an unequal power base, [and] . . . children cannot give informed consent"); D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* 55 (1986) ("Children frequently consent to behavior—sexual and otherwise—regardless of their own

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L.Ed.2d 493, 505n.2 (1989) (Scalia, J. concurring and dissenting). Thus Appellant is arguing for the right to "receive" a communication from an unwilling party—quite a different scenario from the context of *Stanley's* adult obscenity, where presumably all the "speakers," including the actors, took part willingly in its creation.[18] Especially when read in context with Fifth Amendment guarantees against forced expression, the First Amendment does not give anyone the right to receive "speech" from an unconsenting speaker.[19] Otherwise prohibitions against wiretapping and electronic eavesdropping, 18 U.S.C. §2511(1), would run afoul of the principle Appellant invokes.

Nor is it possible for Appellant to find any but the most literal comfort in *Stanley's* concern for "the privacy of one's own home". 394 U.S. at 565. It is precisely in the privacy of the home that most sexual abuse of children occurs: in 1985 over 75,000 *reported* cases.[20] It is in the privacy of the home that many counterfeiters hold communion with the printed materials and printing equipment whose possession is made subject to criminal prosecution. 18 U.S.C. §§472, 474, 480, 481, 485, 487-490. Do these activi-

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wishes, particularly when the request or command comes from an adult or much older child."); D. Finkelhor, *Child Sexual Abuse* 17-22 (1984); Finkelhor, *What's Wrong with Sex between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-695 (1979).

[18] *Stanley* did *not* consider the interests of the *performers* in the materials possessed by the defendant there, and it is quite possible that in circumstances of coercion or fraud those interests could alter its analysis. *See American Booksellers' Ass'n* v. *Hudnut*, 711 F.2d 323, 332-333 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[19] Thus *The Florida Star* v. *B.J.F.*, *supra*, nowhere suggests that the press has the *right* to know the name of a rape victim, and indeed spells out means for the state to protect that information. 105 L.Ed.2d at 455-456. That case and its predecessors only suggest the limits on government action to punish acquisition of such information lawfully, or from the government itself. *Id.* at 457. Under Ohio law, of course, it is wholly unlawful to create or circulate child pornography. Ohio Rev. Code Ann. §2907.323 (A) (1) (Anderson 1987).

[20] D. Finkelhor, *et al.*, *Nursery Crimes: Sexual Abuse in Day Care* 21-23 (1988).

ties fall under *Stanley's* language protecting the "right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home"? 394 U.S. at 565. The *Stanley* Court refused a direct response to this question, 394 U.S. at 568n.11, but the current Court has made it clear that the answer must be negative. *Bowers* v. *Hardwick*, 478 U.S. 186, 195-196 (1986). *See also id.* at 209n.4 (Blackmun, J., dissenting). Where an activity causes direct harm to another (here, the invasion of a child's privacy) and creates the grave risk of future harm (public circulation of the photographs or films), *Stanley's* concern for protecting the home loses its force.

Ultimately this case can be resolved into a contest between concrete, compelling privacy interests of sexually exploited minors, and amorphous, trivial claims to self-realization by adult voyeurs. Surely Appellant can acquire the information and understanding to which the First Amendment guarantees him access without gaping at the bodies of traumatized children.

II. AS CONSTRUED BY THE OHIO SUPREME COURT, THE STATUTE AT ISSUE MAY FAIRLY BE APPLIED TO APPELLANT.

Many, indeed the majority, of Appellant's attacks on the decision below rest not on his *Stanley* claims, but rather on technical grounds of only tangential interest to *Amici*. Because those technical assertions might obscure the central, vital question in the case—whether possession of child pornography may be proscribed—they are worth briefly addressing.

A. Authoritative Construction Narrowing An Arguably Overbroad Statute Does Not Exempt From Prosecution A Defendant Who Engaged In Unprotected Conduct.

Appellant claims that because the statute at issue originally swept all materials showing minors in a "state of nudity", it was (1) overbroad and (2) not capable of being constitutionally applied to him even after a narrowing construction by the state

courts. Appellant's Brief at 13-28. It is not necessary to address the first of those propositions because the second is so flatly incorrect.

Quite simply, "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); *Massachusetts* v. *Oakes, supra*, 105 L.Ed.2d at 502 (plurality opinion).[21] Only where such a construction deprives a defendant of "fair warning" is it constitutionally deficient. *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1965). Here Appellant had ample notice that the material he was hoarding was deemed illicit, even if other, protected material seemed to be covered by the Ohio statute. He is in no different position from the defendants in *Hamling* v. *United States*, 418 U.S. 87 (1974), whose convictions under federal obscenity laws were upheld despite the narrowing construction placed on the broad language of those laws—which by their terms covered "lascivious" and "filthy", as well as "obscene" material—after their convictions. *Id.* at 110-117. The *Ferber* Court, of course, recognized this principle when it recognized the validity of state laws "authoritatively construed" under its guidelines. 458 U.S. at 764.

B. The Definition Of "Child Pornography" In The Challenged Statute As Construed Is Valid.

Appellant's assault on the Ohio statute eventually becomes an attack on *Ferber* itself. Thus he asserts that material involving a "lewd exhibition" of child's genitals may not be constitutionally included in a criminal definition of "child pornography" outside commercial contexts. Appellants Brief at 32-34. This, despite the quite explicit holding to the contrary in *Ferber* itself, 458 U.S. at

[21] Appellant badly misrepresents, Brief at 15-16, the views of Justice Scalia's separate opinion in *Oakes*, which held for five justices that an overbroad statute may not be saved by *legislative amendment* prior to a defendant's final appeal. 105 L.Ed.2d at 503-504. Such legislative action is utterly different, especially in a common law jurisdiction, from a judicial construction that is supported by "fair warning" in the language of the provision construed.

765, and the reaffirmation of that principle, in a wholly *noncommercial* context, by five members of the Court last Term in *Oakes*. 105 L.Ed.2d at 504-505 (Scalia & Blackmun, JJ.); *id.* at 505 (Brennan, Marshall, & Stevens, JJ.).

Less startling, but no more convincing, is Appellant's contention that the phrase adopted by the Ohio Supreme Court—"graphic focus on the genitals"—is outside the permissible bounds of *Ferber*. Appellant's Brief at 35. This language differs in form but not in substance from that of the New York statute approved in *Ferber*, 458 U.S. at 765 ("lewd exhibition of the genitals"). *Both* phrases are rooted in concern for protection of the privacy of a child's most intimate physical attributes from exploitation and stark public display. "Graphic focus" on genitals goes far beyond the "mere nudity" protected by *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213 (1975), especially in a context where works with any kind of serious artistic, scientific, or other value are exempted from prosecution. Ohio Rev. Code Ann. §2907.323(A) (3) (a) (1987). Indeed, "graphic focus" is a more concrete, and so fairer, formulation than the value-laden term "lewd".

If, as Appellant fears, the definition of "child pornography" adopted by Ohio contains the potential for prosecution of constitutionally protected speech, courts will have the opportunity to adjust it on a case-by-case basis. Here, however, he neither claims that the photographs in his possession were not "lewd exhibitions" of a child's genitals, nor demonstrates that the phrase "graphic focus" on genitals will apply to more than a "tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. He thus has utterly failed to sustain an overbreadth attack on the challenged law. *Oakes*, 105 L.Ed.2d at 505 (Scalia, J., concurring and dissenting); *New York State Club Ass'n* v. *New York City*, ___ U.S. ___, 101 L.Ed.2d 1, 16-17 (1988).

Appellant fails, as well, to find a convincing argument that the challenged statute is "underinclusive" because of exemptions

for depictions possessed by parents, with parental consent, or for artistic purposes. Appellant's Brief at 39. It is hardly irrational for a state to conclude that parents are in the best position to protect their children's privacy interests. *See Faloona* v. *Hustler Magazine*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied* 94 L.Ed.2d 151 (1987). Mere possession of child pornography by parents or with their approval is less likely, moreover, to result in its eventual circulation to a wide audience. Further, it is at least plausible to argue that children used in depictions involving a "serious contribution to art or science" are far less likely to suffer the same degree of harm as those used in blatantly exploitative material. *Ferber*, 458 U.S. at 776-777 (Brennan, J., concurring). Ohio's judgment on these matters thus seems well within reasonable legislative discretion.

CONCLUSION

The Attorney General's Commission on Pornography, two separate Canadian commissions, and a substantial number of states have determined that possession of child pornography should be a criminal act.[22] Whether states choose to go so far to vindicate and protect sexually exploited children is a matter for careful legislative deliberation. In that debate, however, it is not a legitimate position to claim that the First Amendment guarantees the permanent existence of child pornography once it reaches the living room of a purchaser. Children raped or degraded on camera deserve at least the hope of smashing the graven image of their nightmare.

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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[22] Attorney Gene.al's Comm'n on Pornography, *Final Report* 648 (1986); 2 *Pornography and Prostitution in Canada: Report of the Special Comm. on Pornography and Prostitution* 630-631 (1985); 1 *Sexual Offences Against Children: Report of the Comm. on Sexual Offences Against Children and Youths Appointed by the Attorney General of Canada* 102-103 (1984). For a partial listing of state statutes prohibiting child pornography possession see Potuto, *supra* note 8, at 18n.18.

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